No. 89-1395

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In the Supreme Court of the United States

OCTOBER TERM, 1989

STEPHEN BARNHART

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Federal Tort Claims Act claim against the Veteran's Administration was timely filed under 28 U.S.C. 2401(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-36a) is reported at 884 F.2d 295. The opinion of the district court (Pet. App. 37a-62a) is reported at 721 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on October 17, 1989 (Pet. App. 63a). A petition for a writ of certiorari was filed on January 16, 1990 (the Tuesday after a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Beginning in 1968 or 1969, after he was diagnosed as suffering from schizophrenia, petitioner was treated for some 12 years at various Veterans Administration hospitals with high doses of thorazine and other antipsychotic drugs. Pet. App. 38a-39a. As a complication of his treatment, petitioner developed severe muscle spasms and uncontrolled bodily movements. A psychiatrist also noted that he displayed signs of behavioral and cognitive deterioration. *Id.* at 39a-41a. In July 1983, Dr. Charles Rehn examined petitioner and informed petitioner's attorney by letter that, in his opinion, petitioner was suffering from "severe tardive dyskinesia from major tranquilizer treatment for schizophrenia." *Id.* at 42a-43a.

In March 1985, petitioner filed an action in federal district court against Smithkline Beckman Corporation, a manufacturer and vendor of thorazine, alleging that he had developed tardive dyskinesia from taking the drug produced by the company. The action was settled. Pet. App. 43a. On February 2, 1987, petitioner filed an administrative tort claim with the VA alleging that his tardive dyskinesia was the result of negligent treatment with antipsychotic medication at VA facilities. The claim was denied by the VA as untimely. *Id.* at 44a. Less than two months later, petitioner filed this Federal Tort Claims Act action against the United States, reiterating his claim of negligent treatment. *Ibid.* He argued that his action was not time-barred under 28 U.S.C. 2401(b)[1] because the tardive dyskinesia produced by

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[1] Section 2401 of 28 U.S.C. provides, in pertinent part:

(a) * * * every civil action commenced against the United States shall be barred unless the complaint is filed

the VA's treatment contributed to his "irrational fear" of proceeding against the VA, thereby impairing his "ability to consent to the filing of a claim" until after the expiration of the two-year administrative statute of limitations period. Pet. App. 54a-55a.

2. The district court rejected petitioner's contention that his mental impairment tolled the statute of limitations. Pet. App. 37a-62a. The district court stated that the Seventh Circuit had never held the two-year period for filing an administrative claim under Section 2401(b) to be subject to equitable enlargement for legal or mental disability (Pet. App. 51a), and that, in any event, application to this case of a such an equitable tolling exception, as defined by other courts of appeals, "would be inappropriate." *Ibid.* The court noted that decisions recognizing such an exception had applied it only in cases where "the claimant's mental condition is allegedly caused by defendant's tortious conduct and directly prevents him from discovering the nature and cause of his injury." *Id.* at 52a-53a. Here, in contrast, the failure to file within the limitations period "resulted not from [petitioner's] failure to discover his injury but from his refusal to pursue his claim." *Id.* at 57a. The district court concluded that petitioner's claim accrued when Dr. Rehn's letter of July 1983 informed him of the nature and cause of his injury, and that the

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within six years after the right of action first accrues. The action of any person under legal disability * * * at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *.

time for filing that claim with the VA expired in July 1985. The court dismissed the action as time-barred under Section 2401(b). Pet. App. 60a.

3. The court of appeals affirmed. Pet. App. 15a-36a. In accordance with the findings of the district court (*id.* at 41a-42a, 58a), the court of appeals observed that "it would seem * * * that the symptoms specifically responsible for [petitioner's] reluctance to sue the VA (most notably his paranoid symptoms) derive more from his pre-existing emotional condition than from tardive dyskinesia." *Id.* at 26a. In reviewing the motion to dismiss, however, the court assumed "that [petitioner's] fear of proceeding against the VA was at least partially a result of the tardive dyskinesia as well." *Ibid.*

The court of appeals stated that the limitations period was governed by the so-called "discovery" rule, which "decrees that a cause of action under the [FTCA] begins to accrue when a plaintiff discovers or should have discovered the cause of his or her injury." Pet. App. 29a (citing, *inter alia*, *United States* v. *Kubrick*, 444 U.S. 111 (1979)). The court noted that three circuits had recognized a narrow "exception" to the rule for cases in which the government's allegedly negligent acts caused a dramatic mental incapacity—such as a coma or the disability resulting from a lobotomy—that rendered the plaintiff absolutely incapable of discovering or understanding the cause of his injuries. Pet. App. 29a-30a (citing *Washington* v. *United States*, 769 F.2d 1436 (9th Cir. 1985); *Clifford by Clifford* v. *United States*, 738 F.2d 977 (8th Cir. 1984); *Zeidler* v. *United States*, 601 F.2d 527 (10th Cir. 1979)).[2] It

[2] The court stated that the principle applied in these cases was not "strictly speaking an exception to the [discovery]

then stated that the question in the present case was "whether, even adopting [this interpretation,] the sort of mental disability under which [petitioner] suffers would suffice to toll the statute of limitations."[3] Pet. App. 32a.

Addressing petitioner's situation, the court stressed that "[i]f [he] was able to proceed against the manufacturer of the drug that injured him at an earlier time, he clearly had 'discovered' the cause of his injury—and understood it well enough to seek redress." Pet. App. 34a. The court observed that, even if the VA's alleged malpractice "caused petitioner to have a specific fear of the [agency], thereby preventing him from suing [it] within the applicable time period, the injury clearly did not prevent him from discovering and understanding the cause of that injury." *Ibid.* The court concluded that in a case such as this, in which "the disability at most erodes or impairs a plaintiff's desire to proceed," the equitable "exception" to the discovery rule, even if valid, is inapplicable. *Id.* at 36a.

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rule," but rather "a restatement of the principle that the cause of action will not accrue until the plaintiff could reasonably have been expected to discover the cause of the injury." Pet. App. 30a-31a.

[3] The court of appeals reiterated its observation in *Crawford* v. *United States*, 796 F.2d 924 (7th Cir. 1986), that the fact that "[S]ection 2401(a) contains an exception for persons suffering under a 'legal disability,' [whereas] [S]ection 2401(b) contains no similar provision" did not "foreclose an argument for tolling the administrative statute of limitations set forth in subsection (b)." Pet. App. 28a-29a. The court reasoned that "the tolling provision in (a) may simply have been included to avoid the absurdity of telling a person who as a matter of law cannot sue that he must sue or lose his rights." *Id.* at 29a (quoting *Crawford*, 796 F.2d at 926).

ARGUMENT

In holding that petitioner failed to file his administrative claim within the statutory limitations period, the court of appeals correctly applied the discovery rule articulated by this Court in *United States* v. *Kubrick*, *supra*. The decision below is also fully consistent with the decisions of other courts of appeals that have applied Section 2401(b) to plaintiffs who are mentally impaired. No further review of this case is warranted.

Under the Federal Tort Claims Act, a cause of action accrues when an individual is sufficiently informed of "the fact of his injury or its cause," *United States* v. *Kubrick*, 444 U.S. at 122, that "a reasonable person" would have been "alerted * * * to the possibility that a legal duty to him had been breached." *Id.* at 125. Consistent with this objective standard, which is designed to advance ease of administration and "the prompt presentation of claims," 444 U.S. at 117, is the long-standing rule that "the usual variety of mental disease and legal insanity" does not toll the limitations period. *Zeidler* v. *United States*, 601 F.2d at 530 (quoting *Casias* v. *United States*, 532 F.2d 1339, 1342 (10th Cir. 1976)); see also *Barren by Barren* v. *United States*, 839 F.2d 987, 991-992 (3d Cir.), cert. denied, 109 S. Ct. 79 (1988).

Several courts of appeals have held the limitations period tolled by certain kinds of severe brain damage or destruction that result from the complained-of treatment and directly prevent the plaintiff from discovering or becoming aware of his injury.[4] The court

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[4] The decisions that apply this exception in cases of coma or lobotomy recognize that those situations are extraordinary

of appeals in this case correctly assessed the scope of the exception as narrowly encompassing neurological conditions that destroy cognitive awareness and comprehension, and not, as petitioner would have it, psychological maladies that "at most erode[] or impair[] a plaintiff's desire" to proceed with legal action. Pet. App. 36a. And as the court further explained, "[t]his focus on awareness or ability to comprehend" is appropriate, given that the issue underlying the discovery rule "is not capability to bring a lawsuit, but rather capability to discover the cause

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and distinguishable from cases alleging some lesser level of mental incapacity, and affirm the continuing vitality of the principle that mental incompetence is not a factor in the determination of the timeliness of an FTCA claim. See *Zeidler* v. *United States*, 601 F.2d at 531 ("the insanity rule discussed in *Casias*" does not apply in the case of a lobotomized plaintiff because "brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity for the purpose of barring * * * an action [under the FTCA]"); *Clifford by Clifford* v. *United States*, 738 F.2d at 980 (court's holding—that a cause of action under the FTCA does not accrue while plaintiff is in coma—leave undisturbed the incompetency rule articulated in *Casias*); *Washington* v. *United States*, 769 F.2d at 1438-1439 & n.1 (relying on *Clifford* to distinguish coma from the ordinary type of mental disability or incompetence for the purpose of applying *Casias*).

As we acknowledged in our memorandum in opposition to a petition for writ of certiorari (at 7) in *Barren by Barren* v. *United States*, No. 87-2103, it is possible to construe these cases as in tension with the general principle that the individual's subjective capacity to appreciate his injury has no place in assessing the claim's timeliness under *Kubrick*. But that potential inconsistency does not warrant the Court's review of the instant case, since, as we explain below, the facts of this case plainly place it outside the scope of the exception as defined in *Zeidler*, *Clifford*, and *Washington*.

of injury." *Id.* at 34a. Accordingly, the court of appeals correctly found "no support" (*id.* at 36a) for the expansion of the tolling exception to cover cases, such as this one, "where the disability at most erodes or impairs a plaintiff's desire to proceed with a recognized cause of action."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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